

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

January 29, 2003

Mr. Paul Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2003-0617

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 174943.

The Texas Commission on Environmental Quality (the "commission") received a request for "(1) all Air Quality Complaints (including confidential information versions of same) against Oso Cotton Burrs, Inc. . . . since 4/12/93; and (2) all Complaint Investigation Reports (including confidential information versions of same) relating to allegations against Oso Cotton Burrs, Inc. . . . since 4/12/93." You claim that certain information you have marked is protected by the common law informer's privilege and is therefore excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.¹

We begin by noting that the submitted information consists of completed investigations made of, for, or by the commission, which are expressly public under section 552.022 of the Government Code. *See* Gov't Code § 552.022(a)(1). Thus, this information must be released to the requestor unless it is excepted from disclosure under section 552.108 of the Government Code or is confidential under other law. You claim that some of the requested information is protected from disclosure under the informer's privilege. The informer's privilege, as incorporated into the Public Information Act by section 552.101, has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928); *see also Roviario v. United States*, 353 U.S. 53, 59 (1957). The informer's privilege under *Roviario*

¹We assume that the sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

exists to protect a governmental body's interest. Therefore, the informer's privilege under *Roviaro* may be waived by a governmental body and is not "other law" that makes information confidential under section 552.022. See Open Records Decision No. 549 at 6 (1990).

However, the informer's privilege is also found in Rule 508 of the Texas Rules of Evidence. The Texas Supreme Court recently held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." See *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether the information in question is confidential under Rule 508.

Rule 508 provides in relevant part:

(a) Rule of Privilege. The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who May Claim. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished, except the privilege shall not be allowed in criminal cases if the state objects.

Thus, an informer's identity is confidential under Rule 508 if a governmental body demonstrates that an individual has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation, and the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 508(c). The information at issue here involves reports made to the commission; they were not made to "a law enforcement officer or member of a legislative committee or its staff conducting an investigation." Therefore, the identifying information you have marked in the submitted documents is not protected under the informer's privilege as provided in Rule 508 of the Texas Rules of Evidence. As you claim no other exception for the submitted information and it is not confidential by law, we conclude that the submitted information must be released in its entirety.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 174943

Enc. Submitted documents

c: Mr. Robert L. Ramey
600 Frost Bank Plaza
802 North Carancahua
Corpus Christi, Texas 78470
(w/o enclosures)

CAUSE NO. GN-204227

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
Plaintiff,

v.

GREG ABBOTT, ATTORNEY
GENERAL OF TEXAS,
Defendant.§
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§
§
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§
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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

126TH JUDICIAL DISTRICT

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND
DEFENDANT'S CROSS- MOTION FOR SUMMARY JUDGMENT

Came on for consideration the Plaintiff's Motion for Summary Judgment, Defendant's Response thereto, and Defendant's Cross-Motion for Summary Judgment. After considering the same, after hearing arguments of counsel, in reliance on *In re the City of Georgetown*, 53 S.W.3d 328 (Tex. 2001) and *Rovario v. United States*, 353 U.S. 53 (1957), and the definitions of *Confidential Communications* and *Privileged Communications* contained in Black's Law Dictionary (6th Ed. 1990), the Court is of the opinion that Plaintiff's motion should be GRANTED and Defendant's motion should be DENIED.

It is therefore ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant's Motion for Summary Judgment is DENIED.

SIGNED on September 2, 2004.

FILED

04 SEP -2 PM 4: 00

Upmani Rodriguez-Lopez
DISTRICT CLERK
TRAVIS COUNTY, TEXAS

Darlene Byrne
DARLENE BYRNE
PRESIDING JUDGE